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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 LAURIE MUNNING,

8 Plaintiff,

9 v.

10 NORDSTROM, INC., *et al.*,

11 Defendants.
12

NO. C19-1810RSL

ORDER GRANTING
DEFENDANT'S MOTION TO
COMPEL ARBITRATION

13 This matter comes before the Court on "Defendant Nordstrom, Inc.'s Motion to Compel
14 Arbitration or, in the Alternative, to Dismiss." Dkt. # 11. Plaintiff Laurie Munning was a regular
15 Nordstrom customer, with accounts with Nordstrom Rack, Nordstrom, and Nordy Club. She
16 filed this complaint in 2019 alleging that Nordstrom's brick and mortar stores in New Jersey
17 employ a uniform and deceptive practice of including fictitious and inflated comparison prices
18 on each price tag to give the false impression that the goods are worth more than the purchase
19 price and/or are being offered at a discounted price. Nordstrom seeks dismissal of the claims,
20 arguing that arbitration agreements formed when plaintiff made purchases through Nordstrom
21 Rack's website or signed up for her Nordy Club account require that this dispute - or at least the
22 gateway issue of whether the dispute falls within the scope of the agreements - must be resolved
23 in arbitration.
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25 Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the
26 Court finds as follows:
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28 ORDER GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION - 1

1 (1) Through decades of small, incremental steps favoring arbitration, we have come to the
2 point where a party will be compelled to arbitrate a particular dispute even where there is no
3 colorable claim that she ever agreed to do so. Such is the case here.

4 (2) Because plaintiff had reasonable notice that her registration for Nordy Club and her
5 on-line purchases were subject to contractual terms and conditions that were available through a
6 co-located hyperlinked alert,¹ the Court finds that she assented to those terms and conditions
7 when she continued with the transactions. *See Chen v. Sierra Trading Post, Inc.*, 2019 WL
8 3564659, at *2-3 (W.D. Wash. Aug. 6, 2019) (collecting and analyzing cases regarding mutual
9 assent in the context of electronic consumer transactions).

10 (3) Although the court generally determines whether a particular dispute falls within the
11 scope of the agreement to arbitrate, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84
12 (2002), the parties may expressly delegate this gateway issue to the arbitrator by clear and
13 unmistakable evidence of such intent, *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S.
14 643, 649 (1986). The Nordy Club contract clearly and unmistakably provides that “disputes
15 about the validity, enforceability or scope of this arbitration provision” fall within the definition
16 of “Nordy Club Dispute” and must be arbitrated. Dkt. # 11-2 at 22.²

17 ¹ Defendant has submitted evidence that plaintiff would have had to agree to Nordy Club’s terms
18 and conditions during the registration process. Dkt. # 11-1 at ¶ 2. With regards to her on-line purchases,
19 plaintiff either logged into her Nordstrom Rack account directly above a hyperlink alert that “By
20 logging in, you agree to our **Privacy Policy** and **Terms & Conditions**” (Dkt. # 11-1 at ¶ 4; Dkt. # 11-2
21 at 33 and 38) or continued as a guest and clicked the PLACE ORDER button immediately below a
22 hyperlink alert that “By placing your order, you agree to our **Privacy Policy** and **Terms & Conditions**”
23 (Dkt. # 11-1 at ¶ 5; Dkt. # 11-2 at 43).

24 ² The Nordstrom.com Terms and Conditions, on the other hand, do not provide clear and
25 unmistakable evidence that the parties intended to arbitrate disputes regarding whether a particular
26 dispute falls within the scope of the agreement. Defendant’s artful use of ellipses notwithstanding, the
27 provision stating that the arbitration agreement limits certain rights “EXCEPT AS” provided in the AAA

1 (4) Defendant's argument that the Nordy Club arbitration provision applies to plaintiff's
2 in-store purchases of goods appears to be meritless. There is no evidence that, in making the in-
3 store purchases, plaintiff accessed the Nordy Club program in any way. Nevertheless, the
4 Supreme Court recently made clear that where the parties have "delegate[d] the arbitrability
5 question to an arbitrator, a court may not override the contract . . . even if the court thinks that
6 the argument that the arbitration agreement applies to a particular dispute is wholly groundless."
7 *Henry Schein, Inc. v. Archer and White Sales, Inc.*, __ U.S __, 139 S. Ct. 524, 529 (2019). The
8 Court was not concerned that frivolous motions to compel arbitration would be a problem: it
9 expressly chose to rely on the arbitrator's ability to "to respond to frivolous arguments for
10 arbitration by imposing fee-shifting and cost-shifting sanctions" to deter wholly groundless
11 motions to compel arbitration. *Id.* at 531.
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15 For all of the foregoing reasons, defendant's motion to compel arbitration (Dkt. # 11) is
16 GRANTED. The Court need not consider the alternative motion to dismiss. Plaintiff shall
17 proceed to arbitration if she intends to pursue the claims asserted in the complaint. The Clerk of
18 Court is directed to enter a statistical termination in this matter.
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21 Dated this 31st day of March, 2020.

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23 Robert S. Lasnik
24 United States District Judge
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26 _____
27 or JAMS rules does not reflect an intent to further limit rights through the AAA or JAMS rules. Dkt.
28 # 11-2 at 5.